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No. 95-

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

NANCY WHITE VENCIL AS TRUSTEE OF THE TRUST OF C.A. WHITE AND FLO. B. WHITE, AND BRENDA WHITE VICK, NANCY WHITE VENCIL, AND GEORGE R. WHITE, INDIVIDUALLY,

Petitioners,

vs.

[KEITH B. QUIGLEY, AS] PRESIDENT JUDGE, COURT OF COMMON PLEAS, 41ST JUDICIAL DISTRICT, JUNIATA AND PERRY COUNTIES, ORPHAN'S COURT DIVISION,

Respondent,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Petitioners seek a Writ of Mandamus against the Respondent, in his capacity as President Judge of the Court of Common Pleas, requiring him to issue rulings and/or determinations on petitions, motions, and appeals long pending before his Court. The Pennsylvania Supreme Court denied, in per curiam opinions, a Complaint in Mandamus (together with a Complaint in Intervention), and a Petition for Reconsideration of the Mandamus Complaint (together with a Complaint in intervention).

The Questions Presented are:

1. Whether the Respondent, in failing to issue rulings and/or determinations on the various petitions, motions, and appeals before his Court violated the Petitioners' rights to "procedural" and "constitutional due process" under the 5th and 14th Amendments to the U.S. Constitution.

2. Whether private property rights of individuals are protected by "constitutional due process" under the 5th and 14th Amendments to the U.S. Constitution, when a state denies "full evidentiary hearings", in matters against other private individuals (that takes away private property rights), that do not involve state or federal funds or benefits.

PARTIES TO THE PROCEEDING

Petitioners (Plaintiff and Intervening Petitioners in the court below):

Plaintiff, Nancy White Vencil, Trustee of the C.A. and Flo B. White Trust.

Intervening Petitioners, Brenda White Vick, Nancy White Vencil, and George R. White, individually, as beneficiaries of the C.A. And Flo. B. White Trust.

Respondent (Defendant in the court below):

The Honorable Keith B. Quigley, as President Judge, of the Court of Common Pleas, Orphan's Court, 41st Judicial District, Commonwealth of Pennsylvania.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED FOR REVIEW.....i

PARTIES TO THE PROCEEDING.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....v

OPINION BELOW.....1

STATEMENT OF JURISDICTION.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS.....1

STATEMENT OF THE CASE.....1

1. Nature of the Controversy.....1

2. Summary of Facts.....2

3. Proceedings Below.....7

   A. Appeal to the Pennsylvania Supreme Court, nature of action and basis for jurisdiction.....7

   B. The Constitutional Claim.....8

   C. Relief Sought.....10

   D. Rulings of Pennsylvania Supreme Court.....10

   E. Proceedings before the United States Court of Appeals for the 3d Circuit. 11

REASONS FOR GRANTING THE WRITS OF CERTIORARI AND MANDAMUS.....11

I. THIS CASE HAS PROFOUND IMPLICATIONS IN PROTECTING CONSTITUTIONAL DUE PROCESS OF LAW FROM INFRINGEMENT BY STATE COURTS IN DISPUTES CONCERNING PRIVATE PROPERTY.....11

II. THIS COURT HAS JURISDICTION TO HEAR THIS CASE AND GRANT THE REQUESTED RELIEF.....13

III. THE PETITIONERS MET THE REQUISITES FOR THE GRANTING OF A WRIT OF MANDAMUS BY THE PENNSYLVANIA SUPREME COURT AND WERE DENIED DUE PROCESS OF LAW BY THAT COURT IN FAILING TO GRANT THE WRIT.....14

IV. THE PETITIONERS MEET THE REQUISITES OF BEING GRANTED A WRIT OF MANDAMUS UNDER FEDERAL LAW.....18

V. THE RESPONDENT HAS CONTINUALLY DENIED DUE PROCESS OF LAW TO THE PETITIONERS.....23

VI. THIS CASE PRESENTS IMPORTANT ISSUES CONCERNING THE AVAILABILITY OF JUDICIAL RELIEF NECESSARY TO PRESERVE CONSTITUTIONAL DUE PROCESS RIGHTS TO THE PETITIONERS 24

A. Fashioning Adequate Relief in This Case Does Not Lie Beyond Judicial Competence.....24

B. A Present Judicial Remedy Is Required to Preserve the Remaining Assets of the Trust.....24

C. The Constitution Requires An Effective Remedy for Respondent's Constitutional Violations.....24

CONCLUSION.....25

TABLE OF AUTHORITIES

CASES

Page(s)

In Re Buchman's Estate,
123 Ca. 2d 546, 267 P. 2d 73
(Dist. Ct. of App. 2nd,
Div. 3, 1954).....5,12,13,21,22,23,24

Steccone v. Morse Products Co.,
191 F. 2d 197 (9th cir.1951).....6,9,20

Goldberg v. Kelly,
397 U.S. 254 (1970).....7,12,13

Commonwealth v. Keenan,
347 Pa 574, 33 A 2d 244 (1943).....7,9,14,16,17

Township of Bensalem v. Moore,
620 A. 2d 76, 152 Cmwlth 540 (1933).....8

Com. ex. rel. Specter v. Dennis,
10 Pa Cmwlth 439, 308 A. 2d 915 (1973).....8

Municipal Publications v. Court of Common Pleas of Philadelphia City,
507 Pa. 194, 489 A. 2d. 1286 (1985).....8

Dumbroski v. City of Philadelphia,
431 Pa. 199, 245 A. 2d 238 (1968).....8

Philadelphia Newspapers Inc. v. Jerome,
478 Pa. 484, 387 A. 2d 425 (1978).....9,14

Boddie v. Connecticut,
401 U.S. 373 (1971).....9,12,14

In Re School Asbestos Litigation,
997 F. 2d 764 (3d Cir. 1992).....9,14,23

Mc Lellan v. Carland,
217 U.S. 268 (1910).....10,23

In Re French's Estate,
137 Mt. 347, 351 P. 2d 548
(1960).....12,13,21,22,23,24

Daniels v. Williams,
474 U.S. 327 (1986).....12

Ex Parte Pennsylvania,
137 U.S. 451 (1890).....14

Goodman v. Meade,
162 Pa. 587, 60 A 2d 577 (1948).....14

Seawell v. Solomon,
77 Pa Cmwlth 199, 465 A. 2d. 130 (1983).....15

Hotel Casey Co. v. Ross,
343 Pa. 573, 23 A. 2d 737, 742(1942).....15

Field and Others v. Holland and Others,
10 U.S. 8 (1810).....16

Exton Drive In v. Home indemnity Co.,
436 Pa. 48, 261 A. 2d 319 (1970);
U.S. cert. den. 400 U.S. 819.....16

P.A.S. v. Travelers Ins. Co.,
7 F. 3d 349 (3d Cir 1993).....19

Lee v. City of Beaumont,
12 F. 3d 933 (9th Cir 1993).....19

Mallard v. U. S. District Court,
490 U.S. 296 (1989).....19

In Re Grossmayer,
177 U.S. 485 (1900).....20

Flagship National Bank of Miami v. Testa,
429 So. 2d 69 (Fla. App. 3 Dist. 1983).....20

La Buy v. Howes Leather Co.,
352 U. S. 249 (1957).....20

Bauman v. United States District Court,
557, F. D 650 (9th Cir 1977).....22

Organization For The Reform of Marijuana Laws v. Mullen,
828 F. 2d 536 (9th Cir 1987).....22

Will v. United States,
389 U. S. 90 (1967).....22

De Beers Consol. Mines Ltd. v. United States,
325 U. S. 212 (1945).....22

Ex Parte Virginia,
100 U. S. 339 (1879).....25

FEDERAL STATUTES

28 U.S.C. ss 1257(a).....1,13

28 U.S.C. ss 1651(a).....1,11,14,18

MISCELLANEOUS

P. R.C.P., Rule 1522 6

Rule 3.2(a), P. Orp. Ct.....5,6

Rule 1026, P. R. C. P.....6

Rule 1361 P. R. C. P.....6

42 P. C. S. ss 5522(b).....8

U. S. Sp. Ct. Rule 13.....11

U. S. Sup. Ct. Rule 20.....11,18

Magna Carta, (1215 A.D.).....16

OPINIONS BELOW

The decision of the Supreme Court of Pennsylvania concerning the Mandamus Complaint and Complaint in Intervention is set forth in Appendix A and is not reported.

In so doing, the Supreme Court of Pennsylvania issued a joint decision on the Mandamus Complaint and the Complaint in Intervention, as more fully described in the third paragraph on page 8 of this Petition For Writ of Certiorari.

The decision of the Supreme Court of Pennsylvania concerning the Petition for Reconsideration is set forth in Appendix B and is not reported. Likewise, this decision concerned all of the Petitioners, who joined in the original Mandamus Complaint.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of Pennsylvania denying the Petition for Reconsideration of the Mandamus Complaint was entered on March 19, 1996. Jurisdiction of this Court is invoked under 28 U.S.C. ss 1257 (a).

In addition, this Court is authorized, pursuant to 28 U.S.C. ss 1651 (a) to issue all writs (including mandamus), necessary or appropriate in all of its jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are the Fifth Amendment, United States Constitution; the Four-tenth Amendment, Section 1, United States Constitution; and 28 U.S.C. ss 1651(a). These provisions are set forth in Appendix C.

STATEMENT OF THE CASE

1. Nature of the Controversy

This case involves a complex inter vivos trust settled by the Petitioners' grandparents in late 1965 to preserve valuable family owned timberland, as well as cash assets, in order to properly manage

these assets and pass them on to the beneficiaries, the Petitioners herein (hereinafter referred to as the Non-Consenting Beneficiaries). and other issue of the Settlors (hereinafter referred to as the Consenting Beneficiaries)[1]. The Trust has been involved in litigation in the Respondent's Court since the early 1980's. During the past nine years the Respondent has continuously failed to issue rulings and/or determinations on numerous motions, petitions and appeals before his Court. The failure to issue a determination on the most important of these has resulted in the denial of the Petitioners rights to "full evidentiary hearings" in which to present and prove a surcharge claim, involving more than a million dollars, against the Consenting Beneficiaries for their unwarranted litigation against the Trustees over the past sixteen years period. This is in complete denial of the Petitioners' "due process rights". He even states on the second page of his Memorandum of June 30, 1995, accompanying his Order of the same date, (a copy of which is set forth in Appendix D and is not reported), that perhaps some of his actions might be "even in violation of due process".

The basic controversy is whether the Respondent as a duly appointed judicial official of the State of Pennsylvania can by his actions and inactions fail to hold "full evidentiary hearings" and/or to issue determinations thereon, thereby denying constitutional "due process" to the Petitioners herein.

2. Summary of Facts

The original Trustees of the Trust were one of the Settlors ("C. A. White"), the Juniata Valley Bank (the "Bank"), the Settlor's two sons, Raymond E. White ("Raymond") and J. Nevin White ("Nevin"), and his son-in- law, the late Roy A. Wingate ("Roy"). All of the original Trustees are no longer Trustees (having either resigned or died), with Nancy White Vencil ("Nancy"), the daughter of

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1 The term Consenting Beneficiaries is utilized (as it was in the proceedings before the Orphan's Court to refer to those beneficiaries who either filed a petition to remove Raymond as a Trustee or filed exceptions to the 1986 and 1992 accountings. Likewise, the term Non-Consenting Beneficiaries refers to those Trust Beneficiaries who did not approve of the Consenting Beneficiaries litigation against the Trust and its Trustees.

Raymond (and herself a beneficiary), being the sole present trustee, whose appointment was confirmed by the Orphan's Court.

The Trust Agreement granted the Trustees broad discretionary powers, allowing them complete freedom to deal with the Trust assets without the permission of any Court.

Since the inception of the Trust, and throughout the entire period of the Trust's administration, there were always conflicts in investment philosophies between the four family (individual) Trustees, who were professional lumbermen and the one corporate Trustee (the Bank). Raymond was an astute and successful businessman, who proposed that the Trust make various investments, and had his proposals been invested in, the Trust's assets would have been greatly enhanced.

The Bank (for self-serving reasons coupled with a lack of adequate knowledge concerning Raymond's Proposed investments, used its one vote to veto these profitable investments.

In addition, the Bank, due to its lack of experience in the lumber industry, hindered the everyday operations of the Trust's substantial timber ground assets, to which these actions caused the Trust to lose vast sums of money. Accordingly, Raymond and Nevin sought the Bank's resignation as a Trustee.

Two of the Consenting Beneficiaries, unaware of the real facts as to why the Bank was resigning, filed a Petition with the Orphan's Court, in the Spring of 1980, to stop the Bank from resigning, and instead erroneously requested that Raymond resign as a Trustee. A year later, the Orphan's Court denied this Petition. This decision was upheld by the Pennsylvania Supreme Court in November, 1984.

During the interim from 1981 to 1985, the remaining Consenting Beneficiaries who were not involved in the appeal of the Orphan's Court order of 1981, embarked upon costly and unsuccessful litigation against the Trustees in an attempt to prematurely gain control of their trust assets.

In November of 1986, the Trustees filed an accounting. The Consenting Beneficiaries responded with two sets of unsubstantiated exceptions. The Respondent appointed an Auditor, Daniel Stern,

Esq., to oversee these exceptions.

The Auditor needlessly allowed undue time to elapse prior to setting hearings, and between hearings, and the exceptions were never fully disposed of until 1994, seven years after their filing. Rulings on these closed issues are still pending, even though the Petitioners have repeatedly re-quested the Respondent for rulings.

Largely due to the fact that the Respondent has continually refused to oversee the Auditor and/or expedite these matters to a timely close, the Trust was not able to terminate on it's original termination date of March 21, 1992. The Trustees filed another accounting encompassing the period from the 1986 accounting through July 1, 1992 (the 1992 accounting) in hopes of finally terminating the Trust, even though the Auditor never fully addressed the exceptions to the 1986 accounting.

The Consenting Beneficiaries responded to this account with the usual frivolous exceptions, and the Respondent again appointed the Auditor to oversee these exceptions also. The Auditor, as he did in 1987, failed to dismiss these exceptions for lack of "offer of proof". This action cause the Trust to sustain massive costs in needless litigation expenditures.

In an attempt to stop the Consenting Beneficiaries unwarranted 12 year litigation, the Non-Consenting Beneficiaries and the prior Trustee filed motions, etc. on November 4, 1992 and December 16, 1993 (respectively) to hold (surcharge) the Consenting Beneficiaries responsible for the losses to the Trust, etc., that were caused by their unwarranted litigation.

The Court appointed Auditor Stern to hear all these matters, the exceptions to the 1986 and 1992 accountings, the Trustee's Motion to Surcharge Beneficiaries, and the prior Trustee's Request for Fees being that he was forced to serve as Trustee 2 years past the original Trust termination date without compensation.

When the Petitioners complained to the Respondent concerning the Auditor's improper actions during the nine years of his appointment, the Respondent ignored these complaints and a Motion to Dismiss the Auditor for Cause and attached Memorandum of Law accompanying a Motion for full evidentiary hearings (App. E.), that cited to 101 documented allegations of the Auditor's misconduct, as

alleged in the Mandamus Complaint (App. F-4).

The Auditor and the Respondent denied rulings on the closed issues (the Consenting Beneficiaries exceptions to the 1986 and 1992 accounts and the prior Trustee's Request for Fees) and a request for a Court Docket (necessary to support the Petitioners' surcharge claim) being that no official Court Docket exists from 1980 through 1993, (App. F-5).

In addition in the spring of 1993, the Respondent allowed the Auditor to remove all of the existing Court Records pertaining to the Trust litigation from the Courthouse and keep them in his sole possession for close to three years. The Petitioners are without knowledge as to whether these records have yet been returned to the Courthouse. When the Respondent was asked to see that the records were returned to the Courthouse and to provide a Court Docket thereon, he refused to do so.

On January 18, 1995, the present Trustee filed a Motion (with the Respondent) requesting rulings on the closed issues prior to addressing the Petitioners' surcharge claim being that these issues were precedent and relative to many of the costs, damages, etc. that they were seeking. The Respondent never ruled on these matters and the Auditor required the Petitioners to attend a surcharge hearing on January 25, 1995 regardless of this fact. In this hearing, little was accomplished, for the majority of the two hour hearing was spent in discussing procedural matters (the lack of a Court Docket and rulings on the closed issues). Only a half hour was afforded to address the lengthy surcharge claim involving 15 years of unwarranted litigation by the Consenting Beneficiaries.

At the end of that hearing, the Auditor denied the Petitioners further evidentiary hearings and set an unrealistic time frame for these parties to present materials and briefs thereon. This fact clearly violates the Petitioners' "due process" rights, to an opportunity to confront and cross examine witnesses in support of their surcharge claim. 12 *In Re Buchman's Estate,* 3 Ca. 2d 546,267 P 2d 73,84 (Dist. App. 2d, Div.3 1954). Appeals to the Auditor and the Respondent on this matter were to no avail.

On March 22, 1995, the Auditor filed a Motion for payment of his fees and expenses. Before the twenty days (under Rule 3.2 (a), Pa. Orp. Ct. R.) had elapsed in which any party could file an Answer,

the Respondent ordered the Trustee to pay the fees. When the Trustee protested, by formal exception, due to the Auditor's misconduct that had caused greater financial losses to the Trust than the fees that he was seeking, the Respondent, without a hearing, ordered the Trustee to make payment within ten days or risk contempt of Court.

The Trustee, under protest, paid the funds into an escrow account of the Court to be dispersed upon the decision of a final appeal on this matter. The Respondent, regardless of this fact, ordered the Clerk of the Court to pay over the funds to the Auditor in violation of P. R. C. P., Rule 1522. In so doing, he violated state procedural statues, the terms of the escrow account, and took away Trust property without "due process" of law.

Shortly thereafter, the Trustee, filed a Petition asking for a hearing on this matter. To date, the Respondent has neither granted the hearing nor ruled on this Petition, thereby denying the Trustee access to any appeal of the payment of the Auditor's fees. *Steccone v. Morse Products Co.*,191 F. 2d 197, 199 (9th Cir. 1951), once again denying her " due process of law ".

On June 27, 1995, the Trustee filed a Motion For Full Evidentiary Hearings on the Surcharge Issues (coupled with a Memorandum of Law and a Notice to Plead) , a Motion to Dismiss the Auditor for Cause (coupled with a Memorandum of Law and Notice to Plead), and a motion for rulings on all motions previously pending motions before the Respondent and hearings thereon.

On June 30, 1995, three days after the numerous Motions, Memorandums, Exhibits, etc. listed above had been filed, and before the twenty days had elapsed under Rule 3.2 (a) of the Pa. Orp. Ct. R. in which the Auditor or any other interested party could respond, and irrespective of the specific Notices to Plead pursuant to Rules 1026 and 1361 of the Pa. R. C. P., the Defendant signed an Order, together with a Memorandum of Law and Letter to the Clerk of the Orphan's Court, (App. D), stating that the Auditor would continue to oversee these matters and that the Petitioners surcharge claim would be handled by deposition only, once again clearly viol-acing Pennsylvania procedural law and denying the Petitioners their rights of "due process". It should be noted that the Respondent allowed the Consenting Beneficiaries numerous hearings to address their unsubstantiated exceptions. Further-more, the Respondent deferred rulings on these very serious matters until the biased Auditor (whose

removal based upon 101 documented allegations of negligence, ineptitude, pre-judices, and misconduct had been sought) issued his Report.

On the second page of his Memorandum of June 30, 1995, the Defendant states that while it is true that the Judge has made some rulings that some folks might consider "from the hip" or precipitous or perhaps "even in violation of due process". This flies in the face of the numerous U.S. Supreme Court cases cited to the Respondent in the Memorandum accompanying the motion for full evidentiary hearings, which included *Goldberg v. Kelly*, 397 US. 254, 90 S. Ct. 1011, 25 L. Ed. 287 (1970), that held that "procedural due process" once denied may not later be obtained.

Furthermore, the Respondent indicated that he did not read the lengthy documented motions, memorandums, exhibits, etc. submitted to him on June 27, 1995. If he had only taken the time to do so, the importance of evidentiary hearings and rulings thereon would have been clearly evident to him.

After that point, papers were submitted to the Court that asked the Respondent to recuse himself from the case based upon his total disregard to effectively handle the numerous matters that had been pending since 1987. In the last paragraph of apparently the second page (the pages being unnumbered) of his Memorandum of June 30, 1995 (App. D), the Respondent states that very possibly the proceedings should be conducted by an assigned Senior Judge, but that this was up to the Pennsylvania A. O. P. C. and can not be assured. Query why didn't the Respondent seek possible assignment of a new judge from the Pennsylvania A. O. P. C., in the interests of justice, rather than issuing his "shoot from the hip order", for "justice delayed is justice denied"? *Commwealth v. Keenan*, 347 Pa. 574, 33 A. 2d 244 (1943).

3. Proceedings Below.

A. Appeal to Pennsylvania Supreme Court, Nature of Action, and Basis for Jurisdiction.

On October 13, 1995, the trustee [prior to the October 15, 1995 deadline stated in the Respondent's Order of June 30, 1995, for the completion date of Depositions (App. D)], the Trustee filed a

Complaint (App. E), seeking a Writ of Mandamus, with the Pennsylvania Supreme Court, well within the six month period running from the date of the Defendant's Order for commencing original actions against the Commonwealth of Pennsylvania or a governmental unit pursuant to 42 P.C.S.A. ss 5522 (b) (1); *Township of Bensalem v. Moore,* 620 A. 2d 76, 80, 152 Cmwlth 540 (1933). Jurisdiction was properly in the Supreme Court of Pennsylvania as there was no appeal or other actions pending in any Pennsylvania lower appellate Court. *Com. ex rel. Specter v. Dennis,* 10 Pa. Cmwlth 439, 308 A. 2d (1973); and *Municipal Publications, Inc. v. Court of Common Pleas of Philadelphia City,* 507 Pa. 194, 489 a. 2d. 1286 (1985).

The Plaintiff, as Trustee of the Trust, had standing to bring mandamus against a public official, as her interests were distinct from those which she shared with the general public. *Dumbroski v. City of Philadelphia,* 431 Pa. 199, 209, 245 A. 2d. 238, 244 (1968).

Brenda, Nancy, and George in their individual capacities filed a Petition to Intervene in Mandamus Complaint (App. G), and a Complaint in Intervention (App. H), both dated before the November 15, 1995 due date for briefs to be filed, stated in the Respondent's Order of June 30, 1995.

B. The Constitutional Claim

The Mandamus Complaint (E-15-16)stated that the Defendant had failed to issue rulings and or determinations in eight instances (accompanied by explanation and case authorities), in violation of procedural and substantive due process rights under the fifth and fourteenth amendments to the United States Constitution:

(1) Ruling on the Motion for Full Evidentiary Hearings on the Petitioners' surcharge claim and offer of proof thereon;

(2) Ruling on the Motion to Dismiss the Auditor for Cause;

(3) Ruling on the closed issues of the Consenting Beneficiaries exceptions to 1986 and 1992 accountings and the prior Trustee's request for fees;

(4) Ruling on the request for a Proper Court Docket;

(5) Ruling on the Exceptions to the Petition for payment of Auditor's fees;

(6) Appeal of Extension of Time to file material with Auditor;

(7) Rulings on the timeliness of opposing counsel's reply to the former Trustee's surcharge motion, and other matters; and

(8) Rulings on the lack of reply by opposing counsel to the Trustee's Memorandum of law with regard to his request for fees.

The Mandamus Complaint stated (App. E-19) that under Pennsylvania law the right to Mandamus exists when (a) the act to be performed is a clear legal right or a mandatory duty (b) there exists in the Plaintiff a clear legal right, (c) a corresponding duty in the Defendant, and (d) want of any other adequate and appropriate remedy. *Philadelphia Newspapers Inc v. Jerome*, 478 Pa 484, 387 A. 2 d. 425, 430 (1978). It then showed how these requirements were met in this case.

As to (a) it showed that although mandamus is an extraordinary remedy, under Pennsylvania case law a writ of mandamus may be utilized to procure the enforcement of a public duty or compel a judge of inferior jurisdiction to perform his duties. *Commonwealth v. Keenan,* supra 33 A. 2d at 249 et seq.

Concerning (b) it demonstrated that the Petitioners as litigants before the Respondent's Court were owed a duty under law to have their case heard. The U.S. Supreme Court has consistently held that when parties are denied access to an effective court process they lose their right to "due process", *Boddie v. Connecticut,* 401 U.S. 373 (1971).

As to (c) there is a corresponding duty incumbent upon a judge to rule on all matters before his Court. *Commonwealth v. Keenan*, supra, and this extends to motions as well. In *Re School Asbestos Litigation,* 997 F. 2d 764, 770 (3d Cir 1992).

Concerning (d), mandamus is the only remedy avail-able for there has been no final appealable order issued by the Defendant. *Steccone v. Morse Products Co.*, supra at 199.

C. Relief Sought

The relief requested of this Court as well, as the relief sought from the Court below, was that of the granting of a writ of mandamus. Although there is not complete diversity of citizenship among the thirteen beneficiaries of the Trust, many of the beneficiaries reside in states other than Pennsylvania. As was pointed out by this Court in *McLellan v. Carland*, 217 U.S. 268, 281 (1910), the chancery jurisdiction of the federal courts has been co-extensive with that of the state courts concerning estates (or trusts), where citizens of different states are involved in litigation, having existed from the beginning of the Federal government, and created by the grant of equity jurisdiction to such courts as it existed in the chancery courts of England. Therefore, where the state has failed to recognize the federal principles of "due process" under law, it falls to this Court to uphold these rights.

The Petitioners sought a Writ of Mandamus from the Pennsylvania Supreme Court ordering the Defendant to perform his statutory duty as a judge under the laws of the State of Pennsylvania to afford full evidentiary hearings, and issue rulings and/or determinations thereon in the eight instances noted under section B above.

They also sought recusal of the Respondent from the proceedings and the appointment of a new trier of the facts to hear the case.

D. Rulings of Pennsylvania Supreme Court

On January 10, 1996, the Pennsylvania Supreme Court issued an order granting an Application for admission Pro Hac Vice and the request to intervene, and denying an Application for Stay, the Complaint in Mandamus, and the Complaint in Intervention (App. A). The order also stated that the Judge's name should be stricken from the caption, without any reason being given.

On January 17, 1996, the Petitioners filed a Petition for Reconsideration of the Court's Order of the 10th of January, 1996 with the Pennsylvania Supreme Court (App. I).

On March 18, 1996, the Pennsylvania Supreme Court issued an Order denying the Petition for Rehearing. (App. B)

E. Proceedings before the United States Court of Appeals for the 3d Circuit.

A Mandamus Complaint was filed with the Third Circuit Court of Appeals on May 21, 1996 (App. J).

By Order entered on June 4, 1996 (App. K) the Third Circuit dismissed the Mandamus Complaint (apparently due to lack of jurisdiction).

The Petition is being filed, within the 90 day period after the final judgement of the Pennsylvania Supreme Court, under section 1 of U.S. Sup. Ct. Rule 13, and in compliance with U.S. Sup. Ct. Rule 20 and 28 U.S. C. ss. 1651 (a), regarding the requirements for filing a Petition for a Writ of Mandamus.

REASONS FOR GRANTING THE WRIT OF CERTIORARI AND MANDAMUS

I. THIS CASE HAS PROFOUND IMPLICATIONS IN PROTECTING CONSTITUTIONAL DUE PROCESS OF LAW FROM INFRINGEMENT BY STATE COURTS IN DISPUTES CONCERNING PRIVATE PROPERTY.

The actions of the Defendant and the Court appointed Auditor raise an overriding constitutional issue that transcends this case and this Judge; i.e. one that will become increasingly more apparent as government continues to enlarge its functions and its regulation of private interests. It is whether a state through the actions of its Courts can take away "procedural due process rights" to a hearing in a private matter involving private parties (and thus their rights to private property), where a state is not denying a party the benefit of public funds or other benefits of a public nature.

In failing to consider the Mandamus Complaint (together with the Complaint In Intervention), and the Petition for Reconsideration (App. I), which discussed this overriding constitutional issue in detail, the Pennsylvania Supreme Court chose not to deal with the very serious question of the deprivation of private property rights by a state without full "due process of law". It had been pointed out, in several Court papers embodying memorandums of law (App. I), to the Respondent, as well as the Pennsylvania

Supreme Court, that two states, California (in an actual appellate Court decision, and Montana in dicta in a Supreme Court decision, have held that the State can not deny "procedural due process rights" to a hearing, in strictly private property matters, *In Re Buchman's Estate* ,supra, and *In Re French's Estate,* 137 Mt. 347, 351 P. 2d. 548 (1960). In both of the above cited cases, the appellate courts held that in failing to grant adequate hearings to an executor of an estate "procedural due process" had been violated.

In failing to consider the Mandamus Complaint and Petition for Reconsideration, the Pennsylvania Supreme Court ignored a line of decisions by this Court in which it clearly stated that the rights of individual private citizens to "procedural and substantive due process" must be protected by the states, courts, and agencies. While these cases previously involved situations where the state was either denying money benefits or other state benefits to its citizens[2], these cases (as the decisions in the *Buchman's* and *French's* cases should), should be equally applicable to private property rights of a purely private nature.

Accordingly, two states have already considered this question and unequivocally stated that federal "procedural due process" (as enunciated in *Golberg v. Kelly*, supra), can not be infringed upon the states or its instrumentalities in denying fundamental rights under the fifth and fourteenth amendments to the right of a full and adequate

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2 In *Goldberg v. Kelly,* 397 U.S. 254 (1970) this Court held that "procedural due process" had been denied unless a predetermination hearing in which the petitioner could present evidence, orally testify, confront, and/or cross examine witnesses was held before the Petitioner's rights to a federally assisted program to aid families with dependent children (administered by the State of New York and local government), were terminated. Likewise, in *Boddie v. Connecticut,* supra, this Court held that welfare recipients by being unable to pay court fees and costs for service of process in divorce cases were denied effective access to the Courts and " due process". *In Daniels v. Williams*, 474 U.S. 327 (1976), this Court stated that a prisoner was deprived of " substantive due process" when the State used certain arbitrary procedures which caused his injury. The Defendant's procedures are quote arbitrary.

trial, before any property rights are taken away. In *Re Buchman's Estate,* supra, and In *Re French's Estate,* supra.

As we approach the twenty-first century, governments (both state and federal) have become more and more involved in regulating our business and private lives in a highly complex technical society. Private citizens, of necessity, have been required to surrender a degree of control of their lives to the government. Implicit in this degree of control of our private lives is the necessity that all of the constitutional safeguards of our republic, to citizens of states, are protected by the state. A free society produces conflicts, and these conflicts must be resolved under law by our Courts. Although the Courts are faced with an enormous burden of criminal litigation, they can not and should not be allowed to dismiss difficult and complex civil matters by failing to act. For them to do so defies constitutional "due process of law".

This Court should hear this case and set guidelines for the Courts to apply in hearing civil disputes of this nature. Although the rights of minority and disadvantaged economic classes should be protected by the Courts, it is equally important that the "due process" rights of ordinary citizens be protected by this Court also. "Due process of law" does not only apply to protect the right of welfare mothers, as in the *Goldberg* case, supra, but it applies to the substantial property rights of the Petitioners herein.

II. THIS COURT HAS JURISDICTION TO HEAR THIS CASE AND GRANT THE REQUESTED RELIEF.

Pursuant to 28 U.S.C. ss 1257, final judgements or decrees by the highest court of a State in which a decision could be heard may be reviewed by the United States Supreme Court where any title, right, privilege, or immunity is claimed under the Constitution, treaties, or statutes of the United States.

Both the Complaint In Mandamus (together with the Complaint In Intervention), and the Petition For Reconsideration raised substantial issues of the Respondents violation of the Petitioners rights to "due process" under both the Fifth and Fourteenth Amendments to the United States Constitution (App. B). Accordingly, this Court has jurisdiction to hear this case.

In addition, this Court is authorized under the "All Writs Act", 28 U.S.C. ss 1651 (a), to issue all writs (including mandamus) necessary or appropriate in all of its jurisdiction. This statute codifies existing case law. *Ex Parte Pennsylvania,* 137 U.S. 451 (1890). Therefore, this Court can issue the request relief.

III. THE PETITIONERS MET THE REQUISITES FOR THE GRANTING OF A WRIT OF MANDAMUS BY THE PENNSYLVANIA SUPREME COURT AND WERE DENIED DUE PROCESS OF LAW BY THAT COURT IN FAILING TO GRANT THE WRIT.

Pursuant to Pennsylvania law (as noted above) the right of mandamus exists when (a) the act to be performed is a ministerial act or mandatory duty, when (b) there exists in the Plaintiff a clear legal right where (c) there exists a corresponding duty in the Defendant, and (d) want of any other adequate and appropriate remedy. *Philadelphia Newspapers v. Jerome,* supra, 387 A. 2d at 430.

In *Commonwealth v. Keenan,* supra, the Pennsylvania Supreme Court held that the act of a judge in ruling upon cases is a mandatory duty under Pennsylvania law [see also *Goodman v. Meade*, 162 Pa. 587, 60 A 2d 577 (1948)]. Federal Case law has held that this duty extends to motions as well. *In Re School Asbestos Litigation, supra.*

While in *Philadelphia Newspaper v. Jerome,* supra, the Pennsylvania Supreme Court did not find that the Plaintiff had a clear legal right to open access to a pre-trial hearing (for his rights had to be balanced against the criminal defendant's rights to a fair trial), in our case, to the contrary, it is the Petitioner's clear constitutional right of "procedural due process" under the fifth and fourteenth amendments to the Constitution that prevents the state from taking away rights and further rights to private property, to present and confront witnesses at an adequate open hearing. In addition, the Respondent has taken away these rights and further rights to private property, by his failure to rule. Likewise, where parties are denied access to effective Court process they lose their due process rights. *Boddie v. Connecticut,* supra.

In this case, the Petitioners herein had specific well defined legal rights to enforce; i.e. the right to have the customary and

necessary Court Docket, necessary rulings on the closed issues, and full evidentiary hearings to protect their "due process rights".

There is an absence of an adequate legal remedy, for if the hearings on the surcharge issue are not held now, "just-ice delayed may be justice denied", due to possible death or incapacity of witnesses, as the history of this case indicates that witnesses have died or been incapacitated, and hence mandamus is appropriate.[3] *Sewell v. Solomon,* 77 Pa Cmwlth. 199, 465 A. 2d 130 (1983).

In the case at issue, mandamus is sought to compel, not control the use of discretion by the Respondent. *In Hotel Casey Co. v. Ross,* 343 Pa. 573, 23 A. 2d 737, 742 (1942), (the Pennsylvania Supreme Court stated:

> "Although the writ is granted by the law side of the Court, equitable principles largely govern its issuance and it will be granted *only where necessary to promote the ends of justice and where the prayer of the petitioner appeals to the conscience of the Court".* [Emphasis added].

In this case it is submitted that justice has not been served by the actions of the Respondent by refusing to literally have anything to do with this involved case after the 1980- 1981 hearings (the Consenting Beneficiaries' litigation against the Trustees).

Instead, he entrusted the case to a predisposed and unqualified Auditor whom he refused to supervise, and who exceeded both his mandate from the Court and areas traditionally delegated to

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3 As noted above, Roy Wingate, one of the former trustees (who was a lumberman and had full knowledge of the litigation and devastating financial effects of this litigation), is deceased. In addition, Eugene Palm, a surveyor and forester (having full knowledge of the extent of loss of timber due to the Consenting Beneficiaries' ongoing litigation) has been permanently disabled by an accident, and is not capable of testifying. The two remaining original Trustees, Nevin and Raymond White, are both over 65 years of age. Due to present and potential health problems, they may not be available for testimony years from now.

an Auditor, ruling on many legal issues that were reserved to the Court. This Court has held that a lower Court, such as the Respondent's, does not have the authority to delegate these duties to the Auditor, and further, that he should have supervised the Auditor's activities. *Field and Others v. Holland and Others,* 10 U.S. 8 (1810).

The *Keenan* case, supra, presented to the Pennsylvania Supreme Court an almost identical case, involving the failure of the President Judge of the Court of Common Pleas of Westmoreland County for failing to fulfil his judicial mandate and rule on matters before his Court; some of which had been pending before his Court for less time than many of the issues in our case. Moreover, the Respondent in his June 30, 1995 Order (App. D) made it clear that he had no intention on ruling until some indefinite future date, if then.

This Court in the *Keenan* case, id, 33 A 2d at 249, citing to Article I ss 11 of the Pennsylvania State Constitution, further held that justice delayed may be justice denied", for it may prejudice or deny a suitor's rights. This provision restates section 40 of the Magna Carta (1215 A.D.) which provides: "To none will we sell, to none will we *deny* or *delay* right of *justice*." (Emphasis added)

The fact that the right to have justice administered without delay is a fundamental right that should not be infringed upon unless no other course is reasonably possible was reaffirmed by the Pennsylvania Supreme Court in *Exton Drive In. v. Home Indemnity Co.*,436 Pa. 48, 261. A. 2d. 319. (1970); cert. den. 400. U.S. 819.

This Court went on to state in the *Keenan* case, id. 33 A. 2d. at 244:

"The *failure* of a *judge to perform promptly* the *duties of his position*, unless he is prevented from doing so by substantial illness or by other circumstances over which he has no control, is one of the *most grave breaches* of that *fidelity* which *every official owes* to the *sovereignty* he is *chosen to serve*." [Emphasis added].

Judge Keenan stated that his ill health prevented him from hearing the cases, but supplied no evidence as to the nature of his health, and the Court apparently did not believe that this defense was

meritorious.[4]

In the case at issue, the Respondent has refused to perform his duties, but like Judge Keenan, does not specify as to how many other more important cases, or other pressing court business, is preventing him from carrying out the duties that *(1) he was elected to perform; (2) took an oath to perform; and (3) which he was paid to perform.*

The Petitioners did not ask the Pennsylvania Supreme Court to decide the difficult substantive and procedural issues submitted, only to issue mandamus so that these matters could at least move forward, since the Respondent refused to ad-equality deal with them. Accordingly, there would at least be an appealable issue, which is better than the current situation of stalemating these issues for over a nine year period. By denying mandamus, the Pennsylvania Supreme Court denied the Petitioners their day in Court, and perhaps forever.

If ever a case compelled the issuance of a writ of mandamus, it is this case. For the Pennsylvania Supreme Court to, in effect, condone the unlawful and unreasonable actions of the Respondent and the Auditor, and to deny mandamus without even as much as an opinion citing to its reasons, is a manifest denial of justice. This is a long and complex case and a fully structured decision by the Pennsylvania Supreme Court would have been helpful in bringing this matter to a prompt and just closure. Furthermore, the Respondent and the Auditor chose not to answer the Mandamus Complaint or cite to any legal authorities to support their positions; and, neither did the Pennsylvania Supreme Court cite to any legal authorities to support their denial.

The Fifth amendment together with the Fourteenth Amendment, Section 1, United States Constitution (App. C), provide that no person shall be deprived of property by a state without "due process of law". By failing to even consider the Mandamus

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4 On page 249 of the *Keenan* case, the Court stated "*** We adjudge the illness pleaded to *be of such a self inflicted nature* as to afford *no excuse* whatsoever for the *pleader's failure to perform* the *duties* which he was *elected to perform*, which he *took* an *oath* to *perform*, and which he is *paid to perform*" [Emphasis added]

Complaint (together with the Complaint In Intervention) and the Petition for Reconsideration, the Pennsylvania Supreme Court, like the Respondent, effectively denied the Petitioners access to the Court system and thereby deprived them of their constitutional "due process rights".

IV. THE PETITIONERS MEET THE REQUISITES OF BEING GRANTED A WRIT OF MANDAMUS UNDER FEDERAL LAW.

While section 1651 (a) of the U.S.C. grants authority to this Court to issue a writ of mandamus in all appropriate circumstances, Supreme Court Rule 20 states that the writ of mandamus under 28 U.S.C. ss. 1651 (a) will only be issued if it is (1) in aid of the Court's jurisdiction; (2) that exceptional circumstances warrant the exercise of the Court's discretionary powers; and that (3) adequate relief can not be obtained in any other court.

This case involves a substantial federal question; i.e. violation of the Petitioners "due process rights" under the fifth and fourteenth of the United States Constitution and, there-fore, will be in and of the Court's jurisdiction, for this Court is the ultimate authority on all constitutional matters.

Exceptional circumstances warrant the exercise of this Court's discretionary powers or the Consenting Beneficiaries litigation against the Trust will erode the assets of this Trust entirely. The failure of the Respondent to act on this matter has already cost this Trust an excessive amount of money. In short, if these actions are allowed to continue, this litigation will bankrupt the Trust.

The hearings on the surcharge claim should have been held in 1992 when the issue was first presented. It should be noted that this ongoing litigation will not come to an end until the Consenting Beneficiaries are held accountable for their frivolous litigation.

If this Court does not intervene, the Respondent will most likely uphold the predisposed Auditor's Report, even though the Petitioners have not been afforded full evidentiary hearings thereon and the Auditor's Report houses numerous misstatements of fact, law, and Record. In addition, such a ruling will be issued in the absence of a Court Docket and the appropriate rulings on the precedent, closed issues. Accordingly, there will undoubtedly be

appeals, which will only waste even more of the Trust's assets.

At the time that this case is finally remanded by a higher Court, witnesses may no longer be available, the Respondent will be retired, and the Trust bankrupt. Therefore, "due process" will be lost forever.

The above paragraph clearly evidences that the third condition of "no other adequate relief" exists in this case. In addition, there are no means by which any of the motions, appeals, and petitions can be appealed at this time, for there are no final decisions on these nine year old issues. Accordingly, the Petitioners have a clear and indisputable right to a writ of mandamus, as they lack adequate alternative means to obtain the relief that they seek. *P.A.S. v. Travelers Ins. Co.*, 7 F. 3d 349 (C.A. 3d N.J. 1993).

Federal case law has held the there are five guidelines to be balanced in determining whether a petition for writ of mandamus or mandamus jurisdiction will be granted: (1) the party seeking the writ has no other adequate means to attain relief; (2) the Petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the challenged order is clearly erroneous as a matter of law; (4) the Order is an oft-repeated error or manifests persistent disregard of federal rules; and (5) the Order raises new and important issues of law of first impression. *Lee v. City of Beaumont,* 12 F. 3d 933 (1993).

As to the first requisite stated by the Court in the *Lee v. City of Beaumont* case, supra; (that of no other means is available), as has been shown herein, that there is no means of appeal existing at this time, and if this case continues on its present course in the Respondent's Court, it will only lead to eventual dissipation of the entire assets of the Trust. This fact also satisfies the second requisite (that of non-correctable damage of prejudice), for once the assets are dissipated "due process" is gone forever. Furthermore, even assuming that there may be assets three years from now, there can be no assurance that the needed witnesses will be able to testify.

As to requisite number three, the Respondent's actions are clearly erroneous as a matter of law. In *Mallard v. U. S. District Court, 490 U.S. 296 (1989),* in a case in which a district court prevented a court-appointed attorney from resigning due to his lack of experience in the matter involved, this Court held that the Court did not properly exercise its jurisdiction under the applicable federal

statute in appointing him, and, accordingly, mandamus was the only and appropriate remedy. Likewise, in this case under state law, the Respondent had a clear duty to act (not in any specified manner) in the matter before him, and, mandamus lies to require that he rule one way or the other. *In Re Grossmayer,* supra, *Steccone v. Morse Product Co.*, supra; and *Flagship National Bank of Miami v. Testa*, 429 So. 2d 69 (Fla. App. 3 Dist. 1983).[5]

As to the fourth requisite, (that of the error being an often repeated error), while we have no specific knowledge of any pattern of cases in which the Respondent has committed the same error and failed to rule (as this Court had in *La Buy v. Howes Leather Co.*, 352 U. S. 249 (1957)[6], nevertheless we seek mandamus on eight grounds for numerous errors of misconduct by the Respondent committed over a nine year period that have caused substantial financial and emotional losses to the Petitioners herein.

In addition, our case like the *La Buy* case, supra, involves various complex issues of fact and law well within the knowledge and experience of the Respondent. It also contains many matters involving interpretation and rulings of law that should not have been referred to an Auditor. Accordingly, for the Respondent to refer all matters subsequent to 1981 to either a Master, who decided a portion of these matters, or the Auditor, constitutes an abandonment of judicial function to which mandamus is the only appropriate remedy.

As to the fifth necessary element for mandamus to be granted by a federal court (that of the order raising new and important issues of law of first impression), this case involves the question of the abuse by the state of private rights of private individuals in disputes with other private individuals. To our knowledge, this has never been addressed by any federal court or this Court before; and, is an issue

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5 In this case the judge did not rule on several motions, for he felt that a jury trial was preferable to his ruling. The Court found no lawful basis for the Judge's failure to rule, and found mandamus to be the only appropriate remedy, as no appeal was possible 429 So. 2d at 70.

6 Evidence in the record showed a pattern of improper reference on many cases to a special master by the District Judge.

that is ripe for determination by this Court.

This issue has been dealt with by only two state appellate Courts, one in an opinion and the other in dicta. In both cases, executors of an estate were involved, and the appeal was from the equivalent State Court to that of the Respondent's Court. Likewise, in both cases the lower Court judge was overruled and the appellate Court reasserted the denial of "procedural due process" as the basis for its decision.

In the *Buchman's Estate* case supra, the executor appeared in Court on an order to show cause why he should not be removed for alleged misconduct and the failure to file an inventory of the estate within the three month period after his appointment prescribed by law. At the initial hearing, evidence was presented as to the executor's mental condition, and in chambers the Judge attempted to have the executor resign. The executor refused to resign, then, and later, in open Court, after his counsel was dismissed. At a continuation of the hearings, when he was once more represented by newly appointed counsel, the Court refused to admit the executor's "offer of proof" and removed him.

In overruling the trial Court, the California Appellate Court, states, in pertinent part, Id at p.84:

> "The fundamental conception of a Court of justice is condemnation only after notice and hearing. No one may be deprived of anything which is his to enjoy until he shall have been divested thereof by and according to law. Under the constitutional guaranties, no right of an individual, valuable to him pecuniarily or other-wise, can be justly taken away without its being done conformably to principles of justice which afford "due process" of law, unless the law constitutionally otherwise provides. "Due process" of law does not mean according to the whim, caprice, or will of a Judge*****. "The power vested in a Judge is to hear and determine, not to determine without a hearing. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets established standards of procedure. It is not for nothing that most of the provisions of the Bill of Rights have to do with matters of procedure. **"

The case of *In Re French's Estate* case, supra, involved the

question of admission of a holographic will to probate. One of the issues discussed in the dicta of the *French's Estate* case, supra, involved the dismissal of an executor by the Court without a hearing. In the *Buchman's Estate*, case, supra, there was an inadequate hearing, while in the *French's Estate,* case, supra, there was no hearing at all. The reason for the dismissal was the alleged misconduct of the executor, coupled with the failure to file an inventory. Summarily, in the *French's Estate* case, there was a rejected "offer of proof" and the denial of full evidentiary hearings by the lower Court, as is true of our case with Petitioners' Surcharge Claim. In the *Buchman's Estate* case, the was no hearing afforded, as is also true of our case concerning the denial of any evidentiary hearings on the Non-Consenting Beneficiaries' exceptions to the '92 accounting, and the numerous other motions cited to above.

Justice Adar, in the dicta in the *French's Estate* case, 351 P. 2d. id at 595, repeating the language of the *Buchman's* case, supra, states that the Petitioners therein have been denied, their "substantive and procedural due process rights", and hence , their "rights to private property". These rights are afforded under the Constitution, and should not be denied them by the very officers of the Court that have sworn to uphold them.

Although in this case we feel that all five prerequisites for granting mandamus set forth in *Bauman v. United States District Court,* supra, were met, in *Organization For Reform of Marijuana Laws v. Mullen*, 828 F. 2d 536, 542 (9th Cir 1987), the *Bauman* balancing test was narrowed to apply if only three of the prerequisites were met with the most important being those of no other available relief, no way of correcting error in the future, and a unique question being presented to the Court in the case at issue. This case certainly meets those three prerequisites, if not all five of them.

While this Court has held that appellate review should generally be postponed until after judgement has been rendered by the trial *Will v. United States,* 389 U. S. 90, 94 (1967), exceptional circumstances amounting to a judicial "usurpation of power" have caused this Court to grant the extraordinary remedy of mandamus. *De Beers Consol. Mines Ltd. v. United States*, 325 U. S. 212, 217 (1945). While in the *De Beers* case, supra, the federal circuit court issued mandamus because the district court did not have the power to enter an order, the same rationale should apply when a lower court has the power to enter an order but fails to take any action, as in our

case. This was the decision of this Court in *McLellan v. Carland*, supra, where this Court decided that a circuit judge was not justified in staying an action before his Court until the State of South Dakota could bring an action in a state court on an action already essentially decided by the federal district court. This would have caused needless delays.

Likewise, as in our case, the Respondent failed to hear and decide the motions, appeals, and petitions before him and (principally the motion for "full evidentiary hearings"), as did the circuit judge in the *McLellan* case, supra, and accordingly usurped the power of his office by denying the Petitioners hereunder their rights of "due process" in his court.

The federal courts have been very conscious to protect the rights of litigants to due process of law and in so doing have utilized mandamus to disqualify a judge from acting where there has been evidence of his lack of impartiality. *In Re School Asbestos* litigation, supra. In so doing, the third circuit court of appeals held that an interlocutory or final appeal were not the only means for attaining a judge's disqualification.

The Petitioners asked for the judge to recuse himself, for demonstrated bias and lack of performance of his duties, and he declined to do so. In addition, his recusal was sought from the Pennsylvania Supreme Court, who did not consider the Mandamus Complaint. The Respondent in court hearings has demonstrated that he did not wish to hear this case and if required to hear it would not do so in an impartial manner. He, in effect, has refused to hear this case since 1981, and his failure to rule and hold evidentiary hearings is evidence of his denial to perform his duties with regard to this case. Accordingly, mandamus should be utilized to cause his recusal from this case.

V. THE RESPONDENT HAS CONTINUALLY DENIED DUE PROCESS OF LAW TO THE DEFENDANTS.

As demonstrated above by continually failing to rule and/or issue determinations, on matters before him the Respondent, like the Judges in *In Re Buchman's Estate*, supra, and in *In Re French's Estate*, supra, cases has denied "due process of law" to the Petitioners by failing to allow them full evidentiary hearings in which to present their surcharge claims.

VI. THIS CASE PRESENTS IMPORTANT ISSUES CONCERNING THE AVAILABILITY OF JUDICIAL RELIEF NECESSARY TO PRESERVE CONSTITUTIONAL DUE PROCESS RIGHTS.

This case presents to this Court, as the highest court in the United States, the issue of whether a state Court Judge by refusing to rule in private matters regarding private property interests of private litigants can deny them their "due process rights" under the fifth and fourteenth amendments to the U.S. Constitution.

It more importantly presents the issue of whether a judge can dispense with allowing private litigants their day in Court in "full evidentiary hearings". The right to a full and adequate hearing is just as much a right in a civil case involving private property, as in any other case. *In Re Buchman's Estate*, supra, and *In Re French's Estate*, supra.

A. Fashioning Adequate Relief in This Case Does Not Lie Beyond Judicial Competence.

The Petitioners herein request only that this Court issue a writ of mandamus requiring the Respondent, or other Judge appointed in his place, to rule upon the issues before him, as enumerated above. Most importantly, he should issue a determination on the motion before him for "full evidentiary hearings", that denies the Petitioners herein their rights to "due process" under the fifth and fourteenth amendments to the U.S. Constitution.

B. A Present Judicial Remedy Is Required to Preserve the Remaining Assets of the Trust.

The assets of the Trust have been greatly dissipated by the Respondent's actions and will continue to be dissipated unless he is directed to make the necessary determinations on the petitions, motions, and appeals presently before his Court. The course of action adopted by the Respondent will only cause further wasteful litigation, and will bankrupt this Trust.

C. The Constitution Requires An Effective Remedy for Respondent's Constitutional Violations.

The Constitutional safeguard of "due process of law" applicable to the federal government, as stated in the Fifth Amendment to the U.S. Constitution, is made applicable to the states in the fourteenth Amendment to the U.S. Constitution. No person may be deprived of property by a state without "due process of law".

As was pointed out by this honorable Court long ago in *Ex Parte Virginia*, 100 U. S. 339 (1879), there has been no serious question in the history of our republic as to Congress' power to impose criminal sanctions against state judges for constitutional violations. Furthermore, the Congress and this Court have regarded denial of fundamental constitutional rights as being a serious offense that the Courts should and will correct. This case has all the earmarks of such denials. Accordingly, since (as noted above) there is no present right of appeal, the only remedy is mandamus; and, it is submitted that this Court should order it to put a halt to the Respondent's constitutional violations.

CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted, and the Court should permit the Petitioners to file their brief stating in detail why the decisions of the Pennsylvania Supreme Court should be reversed and this Court issue a Writ of Mandamus requiring the Respondent to issue the requested rulings and determinations.

Respectfully submitted,

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